

## **THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS AND FREEDOMS: RECENT EFFORTS IN MALTA**

**DR. ANTON MICALLEF**

On 10th September 1990 the Government of Malta deposited instruments of ratification with the United Nations Secretary General for four multilateral treaties concerned with the international protection of human rights. These are: **The International Covenant on Economic, Social and Cultural Rights** (hereafter referred to as Economic, Social and Cultural Rights Covenant); **The International Covenant on Civil and Political Rights** (hereafter referred to as International Covenant); **The Optional Protocol to the International Covenant on Civil and Political Rights** (hereafter referred to as Optional Protocol), all three adopted by the United Nations General Assembly in 1966,<sup>1</sup> and the **Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** (hereafter referred to as the UN Convention on Torture) adopted by the General Assembly in 1984.<sup>2</sup>

All four treaties serve one common purpose: the protection of fundamental human rights and liberties through international legal regulation. But each instrument engenders a separate series of obligations for States in international law and the effect of the implementation of these undertakings by Malta, as a State Party, on our laws will be varied and revolutionary.

The present outline is offered as a succinct record of the principal features incorporated in these instruments and of the contribution made by these texts to the formation of an ever developing comprehensive regime concerning international human rights protection that will become operative under our law.

### **Collective Rights**

In addition to the provisions defining the traditional rights of individuals found in the Universal Declaration of Human Rights, the European Convention on Human Rights<sup>3</sup> the 1966 International Covenants introduce, and they are innovative in this respect, the concept of so-called collective rights. Part I, which is common to and worded in identical terms in both Covenants, provides for the exercise by peoples of their right to self-determination and of exclusive control over their natural wealth and resources. The remedial process provided for in the Covenants in respect of breach of such collective rights, may not be invoked by subjects of rights other than States and collective entities. This is the interpretation offered by the UN Human Rights Committee established under the International Covenant.

### **The Economic, Social and Cultural Rights Covenant**

The 1961 European Social Charter, to which Malta is also a Party, is supplemented by the Economic, Social and Cultural Rights Covenant. In addition, to the comprehensive coverage of various aspects involved in the right

to work offered by the European Social Charter, the Economic, Social and Cultural Rights Covenant includes:

- (i) the right to adequate standard of living for individuals and families;
- (ii) the right to freedom from hunger;
- (iii) the right to enjoyment of physical and mental health;
- (iv) the right to education;
- (v) the right to participate in cultural life and to enjoy the benefits of scientific progress; and,
- (vi) the right to pursue scientific research.

States Parties to the Economic, Social and Cultural Rights Covenant are obliged, *inter alia*, to submit periodic reports to the United Nations Economic and Social Council recording the measures undertaken to ensure protection of the rights defined therein. These reports may, in turn, be transmitted by the Economic and Social Council to the General Assembly and other UN specialised agencies which may either report back on the performance of States Parties' fulfillment of their obligations under the Covenant and / or make recommendations on how a State Party ought to improve its efforts in order to satisfy its contractual obligations under the Covenant.

### **The International Covenant**

States Parties to the International Covenant are also obliged to submit reports to the Human Rights Committee indicating factors and difficulties incurred in the implementation of the Covenant. On its own initiative the Human Rights Committee may also request States Parties to submit reports which, upon their consideration, may elect to exercise one or more of the following options:

- (a) it may report back with its comments and recommendations to the reporting State Party concerned;
- (b) it may advise the UN Secretary-General to send copies or parts of State Parties' reports to a specialised UN body within whose field of competence that report may fall;  
and,
- (c) it may transmit copies of the reports together with its comments to the UN Economic and Social Council.

States Parties may also lodge with the Human Rights Committee complaints indicating that other States Parties are not fulfilling their obligations under the International Covenant. It is necessary for States Parties to declare their acceptance of the Committee's competence to receive and consider such complaints before they may submit representations. The Government of Malta has recognised the competence of the Human Rights Committee in its instruments of ratification.

Where matters which form the basis of such complaints are not resolved satisfactorily between the States Parties concerned, it may be agreed for an

*ad hoc* committee known as Conciliation Commission to be established by the Human Rights Committee in order that the Commission will use its good offices to reach a settlement. Where no agreement is reached the Commission shall report its findings on *questions of fact*, including its views on the possibilities of reaching an amicable solution to the Human Rights Committee. This report shall also record written and oral submissions delivered by States Parties before the Commission. Within three months from receipt of their copy of the report, the States Parties concerned must indicate to the Human Rights Committee whether or not they accept its contents.

### Optional Protocol

The *casus foederis* of the Optional Protocol broadens *ratione personae* the remedial process for human rights violations operative under the International Covenant. Desirous to further secure the international protection of human rights, the Optional Protocol was drafted and adopted to permit individuals to submit communications to the Human Rights Committee informing it of alleged breaches of their rights by States Parties. Communications may only be submitted by individuals subject to the jurisdiction of a State Party to the Protocol. Accordingly, the invocation of the process of accountability under the Optional Protocol is not exclusive to nationals of States Parties. Thus, it will be permissible for aliens present in Maltese territory to inform the Human Rights Committee of any failure of the Government of Malta either in securing the exercise of fundamental liberties provided for in the International Covenant or for failure to provide a remedy where breach of fundamental rights has occurred. As a State Party to the Optional Protocol, Malta has accorded its nationals, residents and even its most temporary visitors access to a global rather than a regional forum dedicated to prevent and to remedy human rights violations.

Communications will not be considered by the Human Rights Committee if: (a) they are anonymous, (b) remedies under national law are not previously exhausted, (this rule also applies to the complaints procedure operative under the International Covenant) and (c) the matter concerned is simultaneously under review by another procedure of international investigation or settlement. However, when ratifying the Optional Protocol, Malta submitted its interpretation of this third requirement and restricted the application of the rule by including matters that had already formed the subject matter of a previous inquiry. There is no “appeal”, therefore, to the Human Rights Committee from the decisions of the European Human Rights Commission. A person seeking a remedy against the Malta Government, after exhausting all remedies under national law, will have to choose between New York and Strasbourg.

The reporting process and the filing of complaints and individual communications under the Economic, Social and Cultural Rights Covenant, the International Covenant and the Optional Protocol respectively, may not, either singly or jointly, represent an effective international machinery capable of providing remedial action as that operative under the European Convention on Human Rights. However, alongside the “Strasbourg machinery”, Maltese

nationals and persons present in Malta will have access to an additional / alternative international body designed to ensure the protection of fundamental rights and liberties by States Parties which, failing to fulfill their international obligations, would risk becoming subjects of scrutiny and exposure before the international community.

Overall, these instruments (including the 1969 OAS Convention on Human Rights <sup>4</sup> and the 1981 OAU Charter on Human Rights <sup>5</sup>) are standard-setting in the international law on human rights. Since the end of the Second World War, they feature among the major international agreements which have: (a) substantially contributed to the formation of a very specific *corpus* of peremptory rules in international law; (b) increased State accountability in the international community; and, more radically, (c) participated in the development of an international legal regime which now provides individual punishment for human rights violations considered to be criminal offences under international law. The UN Convention on Torture is an excellent illustration of these developments.

## **Torture**

The UN Convention on Torture differs significantly from the other three human rights instruments ratified by Malta in that the remedies it provides lie principally in the criminal law. The landmark achievements of the 1984 treaty on torture are the following:

A. Unlike the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, and the African Charter on Human Rights, the UN Convention on Torture not only prohibits the practice of torture but it provides, for the first time within the framework of an internationally binding legal instrument, (i) a definition of the concept and (ii) proscribes it as a criminal offence.

Torture is defined as acts of severe pain or suffering (physical or mental) intentionally inflicted by or at the instigation of a public official or other person acting in an official capacity for one or more of the following purposes (i) obtaining from a person or third party information or a confession; (ii) punishing a crime committed or suspected of having been committed, by a person or third party; (iii) intimidating or coercing a person or third party; and, (iv) for any other reason based on discrimination. This definition is largely taken from article 1 of the Declaration on the Protection of All Persons from being Subjected to Torture and other Cruel, Inhuman, or Degrading Treatment or Punishment, adopted by consensus by the UN General Assembly in 1975 <sup>6</sup>. That definition also served as a useful working basis for the definition now appearing in the *International American Convention To Prevent and Punish Torture* adopted in 1985 by the Organisation of American States <sup>7</sup>.

States Parties to the UN Convention on Torture are obliged to take all necessary measures, and that includes legislation, to ensure that torture is rendered a criminal offence under their laws. This obligation, now binding

upon Malta, would result in the addition of torture as a separate crime under our Criminal Code. Currently, there is no definition of the crime of torture as such under our law. It would be a weak and conspicuously evasive approach by the Maltese legislator to argue that torture is adequately covered by the provisions concerning the crimes of bodily harm under the Criminal Code in an attempt to refrain from inserting necessary amendments thereto. Should such an approach form the basis of legal advice offered by government lawyers, it would seriously question Malta's fulfillment of its international obligations contracted under the Convention. To argue that the practice of torture is adequately covered by the provisions regulating bodily harm under the Code, is tantamount to total disregard for the particular nature and specific intent required by the definition of torture under the UN Convention.

*Prima facie* weaknesses in the definition of torture under the UN Convention include: (i) the qualification *ratione personae* of candidate offenders. This is restricted to public officials or persons acting in an official capacity. The legislator in Malta may wish to broaden this category to all individuals including those acting in a private capacity. The law would cater for all circumstances such as in a terrorist situation where torture may be practiced by hijackers (who do not usually occupy a public office) to obtain information from members of the crew or airline passengers. Such legislation would not run counter to the UN Convention on Torture because it permits national legislation to be of wider application *ratione personae* than that provided for in its definition of the crime of torture.

B. Following the pattern of other standard-setting treaties, such as the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation; the 1973 UN Convention on the Prevention and Punishment of Crimes Committed Against Internationally Protected Persons Including Diplomats; and the 1979 UN Convention Against the Taking of Hostages, the UN Convention on Torture incorporates a series of measures which have transformed the criminal law content of international law and, when implemented by Malta as State Party, will have a similar impact upon our criminal law. These measures are listed below and will engender the following consequences.

**(i) Criminal Jurisdiction.**

The Convention provides for the exercise of jurisdiction by States Parties on four separate bases. These are:

- (a) the territorial principle including crimes committed on board vessels and aircraft registered in the flag state.
  - (b) the active personality principle, i.e. where the perpetrator of the crime is a national of the State Party;
  - (c) the passive personality principle, i.e. where the victim of the offence is a national of the State Party;
- and

- (d) the universality principle, i.e. when the offender is merely present in the territory of a State Party.

The territoriality principle provided for under the Convention is in conformity with our provisions on jurisdiction in the Criminal Code (Section 5.a., b., & c.) and its implementation would not necessitate any amendment. However, in view of Malta's obligation under the UN Convention on Torture to take necessary measures to establish its jurisdiction in respect of the offence of torture, legislation is required to ensure that the active, passive and universality principles of jurisdiction stated above would form part of our law. Thus, in addition to the crimes defined in Section 5.d. of the Criminal Code, in respect of which the active personality principle applies, there shall be added the crime of torture. The passive personality principle does not feature in Section 5 of the Code and this will be a new ground by virtue of which torture may become justiciable before our courts even if committed outside Maltese territory. Finally, if the circumstances so present themselves, proceedings would have to be instituted in Malta if the presence of the alleged torturer is secured in Maltese territory and he is not extradited. His presence in Malta may well be the only juridical basis on which criminal proceedings are instituted: the offender and the victim may both be non-Maltese nationals and the offences may have taken place in the territory of a third State. This involves the application of the so-called principle of universal jurisdiction which in Section 5 of the Criminal Code applies in respect of commercial fraud and forgery. When appropriate legislation is enacted, it will also become applicable vis-a-vis torture.

#### (ii) **Aut Dedere Aut Punire**

The application of the universal principle of jurisdiction in respect of torture by States Parties under the UN Convention is circumscribed by the so-called *aut dedere aut punire* principle. In other words a State Party would exercise universal jurisdiction only where either no request for extradition is submitted, or, if such request is made, it is refused. The State Party which has presence of the offender is then obliged to institute criminal proceedings before its own competent tribunals. This is the essence of the either extradite or prosecute principle. The obligation is not on extradition but on institution of criminal proceedings. That the proceedings must result in a conviction is not obligatory under the UN Convention on Torture. It is sufficient that the case is brought before the competent national authorities for the purposes of prosecution.

The essence of these provisions is to ensure the application of the "no safe haven" approach which is the *casus foederis* of the UN Convention on Torture and other treaties concerned with the international proscription of criminal offences. The torturer, like the pirate before him, is now considered candidate for that "exclusive club" of outlaws in international law known as "enemies of mankind". However, State representatives involved in the drafting of the treaty would only accept an exception to the sacrosanct principle of territorial jurisdiction if it formed part and parcel of the *aut dedere aut punire* principle.

### (iii) Superior Orders

The fact that a person committed torture because he was following “superior orders”, is not an acceptable defence for a charge of the criminal offence of torture. This is provided for in the Convention and owes its presence to two factors: (a) the crime of torture is almost invariably committed in the execution of orders from a superior. Indeed, the definition of torture in the Convention includes reference to individual responsibility for whomsoever instigates, consents or acquiesces that the crime of torture may be perpetrated; and, (b) the non-applicability of the defence of “superior orders” dates from the Charter of the International Military Tribunal annexed to the 1945 London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis. One of the Nuremberg legacies is the principle that the perpetrators of acts considered to be criminal offences under international law may not escape punishment by arguing that criminal responsibility is not incurred because they were merely following orders. This rule now applies to torturers. There is no provision contemplating this specific ground of defence under our law and legislation would be necessary, again, in view of Malta’s general undertaking to ensure that torture is rendered a crime punishable under its law.

### (iv) Extradition

States Parties to the UN Convention on Torture are obliged to include torture in all prospective extradition agreements concluded with other States Parties. In addition, torture is deemed to be included as an extraditable offence in extradition agreements already existing between States Parties, even if it is not specified therein. Further, States Parties, like Malta, which consider extradition to be conditional on the existence of an extradition treaty, may (there is no obligation here) consider the UN Convention on Torture as the appropriate legal basis for the purpose of entertaining an extradition request by other States Parties.

C. The processes of State accountability and reporting operative under the UN Covenants and Optional Protocol are also to be found in the provisions of the UN Convention of Torture. A Committee Against Torture has been established and it receives reports from State Parties on the measures taken in view of their obligations under the Convention. The submission of reports by States Parties is obligatory. The first report is to be submitted within the first year since the entry into force of the Convention for the State Party concerned, thereafter reports are submitted periodically (every four years). An exchange of comments and observations between the Committee and the reporting State Party normally follows the reporting stages.

The Committee is empowered to take the following steps where it receives information from States Parties that torture is being systematically practiced in the territory of a State Party:

- (i) it will call upon the State Party concerned to present its own information and observations on the matter raised; and,

- (ii) it may appoint one of its members to conduct a prompt and confidential inquiry which could include visits to the territory of the State Party concerned if this is permitted by same State Party.

On the conclusion of the inquiry, the Committee will transmit the findings together with any comments or suggestions that it may deem proper to make to the State Party. The Committee may also include a summary account of the matter raised in its annual report to States Parties and to the UN General Assembly.

The procedure by which State complaints and individual communications are lodged with the UN Human Rights Committee also operates under the UN Convention on Torture. However, State Parties must first declare their acceptance of the competence of the Committee Against Torture to receive and to consider complaints and communications before they may participate in the review procedure administered by the Committee. The competence of the Committee has been recognised by Malta in its instrument of ratification.

The Committee Against Torture differs in one important respect from the Human Rights Committee when considering communications from individuals subject to the jurisdiction of States Parties claiming to be victims of torture. Thus, whereas the Human Rights Committee will not entertain individual communications which form, simultaneously, the basis of consideration by a separate international investigation or settlement, the Committee Against Torture, in addition will not entertain communications that *have already been* considered under an alternative procedure of inquiry. However, in view of Malta's interpretation of the competence of the Human Rights Committee as being identical, in this respect, to that of the Committee Against Torture, the distinction between the two becomes academic in so far as Maltese nationals and others present in Malta may benefit under these instruments.

Accordingly, the review mechanisms of the Committee Against Torture run along lines similar to those of the Human Rights Committee. Indeed the UN Convention on Torture recommends that States Parties ought to consider members of the Human Rights Committee as candidates most suitable for nomination to the Committee Against Torture.

However, the Committee Against Torture represents the reaffirmation of a process that has developed in international practice whereby the supervision of human rights protection has progressed, initially, from being administered by international fora whose terms *ratione materiae* covered a broad range of fundamental rights and freedoms (e.g. the Human Rights Committee and the European Commission of Human Rights) to specialised bodies entrusted with ensuring respect for very specific human rights. Thus the Committee established under the UN Convention on Torture rather than creates duplicity projects continuity and is squarely consistent with previous practice evidenced, *inter alia*, by the establishment of the Committee of Racial Discrimination under the 1966 UN International Convention on the Elimination of All Forms of Racial Discrimination and the Special Committee on Apartheid referred to in the 1973 UN Convention on the Suppression and Punishment of the Crime of Apartheid.



## CONCLUDING OBSERVATIONS

As State Party to these landmark treaties, Malta has made an unequivocal declaration of its commitment to respect and to safeguard individual and (now) collective rights and liberties. Recognition of the competence of the Human Rights Committee and of the Committee Against Torture to receive State Party complaints and individual communications, alone, constitutes sufficient evidence for this commitment to be now considered entrenched in Malta's foreign policy considerations.

Provisions for new fundamental rights and freedoms, proscription of new criminal offences and extension of the traditional reach of State criminal jurisdiction, are a fairly loaded brief for any government legal officer and no doubt the Attorney General's Office will relish the opportunity to advise Government on such matters. However, it is the obligation to legislate, *per se*, and the form which that legislation takes that will determine whether or not Malta detracts force from this admirable, though overdue, endorsement of a global scheme designed for the protection of human rights.

### Notes:

1. Texts at: Brownlie, *Basic Documents on Human Rights*, 1981 (2nd edn.), pp.118, 128, 146.
2. G.A. Resolution 39 / 46, 1984. Text also at: 23 *ILM* 1027.
3. Cf. European Convention Act, 1987.
4. Text at: 9 *ILM* 673.
5. Text at: 21 *ILM* 59.
6. See G.A. Resolution 3452 (XXX), 9th December, 1975. Text at: Brownlie, *Basic Documents on Human Rights*, p. 35.
7. See OAS, G.A. Res. 783 (XV - 0 / 85), 9th December, 1985. Text at: 25 *ILM* (1986) 519.

Dr. ANTON MICALLEF LL.D. is Lecturer in International Law in the Faculty of Laws, University of Malta. Formerly, he acted as Legal Assistant to Government appointed Inquiries at the Home Office in Whitehall, London. The views expressed here are those of the author alone and bear no official authority. This review covers practice as at 30th September, 1990.